No. 14778

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

IDA MAE HERMANN, IRVING E. HERMANN, ROBERT M. SMITH, M. B. SCOTT, HAROLD SHEIN, H. C. RICHARDS, GEORGE PATTERSON, LEONARD ROSEN, ORVILLE KELMAN, and CAPTAIN G. D. THOMPSON,

Appellants,

vs.

CIVIL AERONAUTICS BOARD,

Appellee.

Appeal From the United States District Court for the Southern District of California.

REPLY BRIEF FOR APPELLANTS.

FILED

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No. 14778

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

Ida Mae Hermann, Irving E. Hermann, Robert M. Smith, M. B. Scott, Harold Shein, H. C. Richards, George Patterson, Leonard Rosen, Orville Kelman, and Captain G. D. Thompson,

Appellants,

vs.

Civil Aeronautics Board,

Appellee.

Appeal From the United States District Court for the Southern District of California.

REPLY BRIEF FOR APPELLANTS.

The appellee, the Civil Aeronautics Board, hereinafter called the "Board," has cited various cases to this Court in its brief which purport to show that so long as the documents sought in the Board's subpoenas at issue on this appeal "relates to or touches the matter under investigation"[1] or, conversely, are "not plainly irrelevant to any

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[1] "relates to or touches the matter under investigation"; *Cudahy Packing Co. v. National Labor Relations Board,* 117 F. 2d 692, 694 (C. A. 10, 1941), cited by the Board in support of the quoted language, concerns a subpoena issued by the National Labor Relations Board to obtain information pertinent to an election to select the bargaining representative of respondent's employees and was not a "trial or adversary proceeding." Respondent's principal objection to the subpoena was that the National Labor Relations Board's order directing the election was void because of arbitrary

lawful purpose of the Agency,"[2] this Court must order the subpoenas enforced. The Board says this Court has no authority to decline to enforce these subpoenas if the documents demanded "appear to be probably relevant to a lawful investigation."[3] The Board then urges that once these minimal and wholly mechanical tests are met, the volume and extent of the documents sought in the

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and capricious acts committed and delays caused by the Board. The quoted language is dictum and merely paraphrases the statute giving the District Court jurisdiction to enforce the administrative subpoena. The court stated, at 117 F. 2d 693, that the respondent "does not . . . contend that the evidence sought by the Board does not relate to the subject under investigation."

[2]"not plainly irrelevant to any lawful purpose of the agency"; *Endicott Johnson Corp. v. Perkins,* 317 U. S. 501, 509 (1943). The principal question in this case is whether the Secretary of Labor, in administering the Walsh-Healy Public Contracts Act, could issue and enforce an administrative subpoena without first determining that respondents were within the coverage of the statute. Respondents argued that the documents demanded were not material or relevant only because respondents' claimed that its activities were not covered by the statute. They raised no defense respecting the validity of the subpoenas themselves. The Supreme Court decided that coverage could be determined in the same proceeding with issues relating to violations.

[3]"appear to be probably relevant to a lawful investigation"; *Smith v. Porter,* 158 F. 2d 372, 374 (C. A. 9, 1946), cert. den., 331 U. S. 816 (1947). The quoted language is clearly dictum because respondent had argued that the subpoena and court order enforcing subpoenas were void and unlawful for reasons totally unrelated to relevance and materiality of the documents demanded. "No point is made [by the respondent] as to the materiality of any particular document called for in the subpoena." (158 F. 2d 374.) In the absence of objection by the respondent, the court said that the documents were probably relevant to the inquiry, which was an investigation by the Office of Price Administration and not a "trial or adversary proceeding."

Hagen v. Porter, 156 F. 2d 362, 365 (C. A. 9, 1946), cert. den., 329 U. S. 729 (1946). This case concerned an investigation by the Office of Price Administration to determine whether respondent was complying with the Administrator's regulations. It was not a "trial or adversary proceeding." In discussing respondents' defense that the documents were neither relevant nor material, the court stated, at 156 F. 2d 364-365: "Appellants' principal complaint under these assignments seems to be that the Administrator failed to

subpoenas is immaterial and cannot be considered by this Court.[4]

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allege the existence of probable cause for believing that appellants have violated the Act."

Provenzano v. Porter, 159 F. 2d 47, 48 (C. A. 9, 1947), cert. den., 331 U. S. 816 (1947). The principal issues present here were probable cause and coverage of the statute. The Office of Price Administration was merely conducting an investigation and this was not a "trial or adversary proceeding." The respondents had failed to produce the documents sought in the subpoena, for inspection.

Jackson Packing Co. v. N. L. R. B., 204 F. 2d 842, 843 (C. A. 5, 1953). The "prime ground" urged for reversal here was that the subpoenas were not properly issued and the authority to issue subpoenas could not be delegated by the Administrator. (204 F. 2d 843.) The court permitted inspection of records subject, however, to control of the inspection by the District Court should the Board use the subpoenas in an unreasonable or oppressive manner.

[4]*Oklahoma Press Publishing Co. v. Walling,* 327 U. S. 186 (1946), is discussed in the text, *infra.*

Westside Ford, Inc. v. United States, 206 F. 2d 627 (C. A. 9, 1953). This case does not support the proposition it is cited for by the Board. The proceeding was an administrative investigation, not a "trial or adversary proceeding," and the court ordered an inspection of documents on the premises of the respondent. While it is stated at 206 F. 2d 635, that "enforcement of a lawful subpoena, will not be denied because it causes inconvenience or harassment," the court had reference to alleged administrative improprieties and harassing actions which had no relation whatsoever to burdensomeness of the demand or materiality or relevance of the documents sought in the subpoena.

Fleming v Montgomery Ward, 114 F. 2d 384 (C. A. 7, 1940); cert. den., 311 U. S. 690 (1940). This proceeding was an administrative investigation and was not a "trial or adversary proceeding." The principal issue was whether or not the Administrator had shown "reasonable cause" to believe that the respondent was violating the Act. The case lends no support to the stated proposition.

McCarry v. S. E. C., 147 F. 2d 389, 392 (C. A. 10, 1945). This proceeding concerned an investigation and was not a "trial or adversary proceeding." The court stated that the test of the validity of the subpoena is whether the documents called for are pertinent and relevant to the inquiry and added the important qualification that "The process is lawful if it confines its requirements within the limits which reason imposes in the circumstances of the particular case." (147 F. 2d 392.)

A swift appraisal of the foregoing assertions of the Board gives rise to the immediate impression that the Board cannot be correct in each of its arguments. A critical analysis of these propositions reveals that each and every one of them is invalid and find no support in the cases cited by the Board.[5]

The Board's analysis is defective primarily for two reasons:

1. The administrative subpoenas at issue in each of the cases cited by the Board in support of the foregoing propositions were issued in exploratory administrative investigations which were not "trial or adversary proceedings."

2. These propositions of the Board are taken out of context in actions to enforce administrative subpoenas where the principal issue was coverage of the administrative statute, the existence of probable cause, the validity of issuance of the subpoena or prior arbitrary, capricious or delaying actions on the part of the administrative agency.

Appellants have shown in their main brief that there is a real distinction between the allowable breadth of *subpoenas duces tecum* issued in an exploratory administrative investigation, on the one hand, and administrative subpoenas issued in the course of a "trial or adversary proceeding" on the other hand. This Court stated in *Hagen v. Porter, supra,* at 156 F. 2d 365, that:

> ". . . the standards of materiality or relevancy are far less rigid in an *ex parte* inquiry to determine the existence of violations of a statute, than those applied in a trial or adversary proceeding."

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[5]See Footnotes 1-4, *supra.*

This quotation was later cited with approval by this Court in *Westside Ford v. United States, supra,* footnote 4, a case relied upon by the Board. The Office of Price Stabilization was conducting an investigation of respondent's business records in the *Westside Ford* case. There were no charges pending nor was any punitive relief sought by the administrative agency. The Board also relies upon *Oklahoma Press Publishing Co. v. Walling, supra,* footnote 4, which is readily distinguishable upon the same ground. There the Court stated, at 327 U. S. 201:

> "The very purpose of the subpoena and of the order, as of the authorized investigation, is to discover and procure evidence, not to prove a pending charge or complaint, but upon which to make one if, in the administrative judgment, the fact thus discovered should justify doing so."

In Docket 6908, the Board seeks an order (1) revoking the licenses to engage in air transportation held by Great Lakes Airlines, Inc. and Currey Air Transport, Limited; (2) requiring each of the respondents in Docket 6908 to cease and desist from violating Section 408 of the Civil Aeronautics Act; and (3) requiring each of the respondents in Docket 6908 to cease and desist, jointly or severally, from engaging in air transportation directly or indirectly [R. 35]. In short the Board seeks to put each of the respondents out of business in this proceeding. This administrative proceeding, as distinguished from the administrative proceedings in the cases cited by the Board, is truly a "trial or adversary proceeding."

The subpoenas in the *Oklahoma Press* case sought the production of specified records to determine whether the

respondents were violating the Fair Labor Standards Act, "including records relating to coverage." (327 U. S. 189.) The court stated, at 327 U. S. 217, in footnote 57:

> "The issues of . . . relevancy of the materials sought, and breadth of the demand are neither minor nor ministerial matters. Nor would there be any failure to satisfy fully the discretionary power implied in the statute's use of the word 'may,' rather than 'shall,' . . . in authorizing the court to enforce the subpoenas."

Section 1004(d) of the Act (49 U. S. C. 644(d)) similary provides that the court "may" issue an order requiring the production of documentary evidence.

The principal argument of the respondents in the *Oklahoma Press* case was coverage. The case stands primarily for the proposition that coverage should, in the first instance, be determined by the administrative agency, which may proceed to require the production of evidence upon its own determination that the respondent is within the purview of the administrative statute. All of the other cases relied upon by the Board are concerned primarily with the questions of coverage, probable cause, validity of the issuance of the subpoenas and/or arbitrary, capricious or delaying actions by the administrative agency. In each of these cases the principal contention of the respondent related to one or more of these issues and the discussions by the court from which most of the citations relied upon by the Board are taken, are merely dictum or relate to makeweight arguments raised in these cases. This appeal, on the other hand, is not concerned with the questions of coverage or probable cause but instead is limited to the validity of the administrative subpoenas themselves.

Appellee makes many factual statements in its brief which are not of record on this appeal. While appellants do not propose to discuss each of these factual allegations in this reply brief, they cannot leave unchallenged the statement contained on page 18 of appellee's brief that appellants "shifted their position" at the hearing subsequent to the District Court's inspection order of April 7, 1955 by contending that many of the records and documents sought in the subjoenas were not available to appellants or did not exist.

The District Court's inspection order of April 7, 1955 provided that the Board's representatives could inspect the facilities of the respondents in Docket 6908 and make copies and photographs of the documents located thereat and further provided that the hearing before the District Court would resume on April 18, 1955 [R. 115-116]. At this latter hearing, the Board's representatives presented affidavits to the Court, without notice to appellants, which purported to show that appellants had not complied with the inspection order of April 7, 1955 [R. 117-125]. The District Court, relying upon the accuracy and veracity of these affidavits, ordered each of the subpoenas enforced as written [R. 126].[6] Appellants, in seeking a rehearing or new trial, filed counteraffidavits which demonstrated that appellants had complied with the inspection order of the District Court [R. 129-142]. This was not a shift of position by the appellants, as alleged by the Board. It was necessary for appellants to file affidavits answering the Board's charge that they had failed to permit inspection in order to obtain a rehear-

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[6]Except the subpoena issued to Appellant Leonard Rosen who was ordered to appear *ad testificandum* only [R. 145].

ing in the District Court. Appellants were successful in obtaining a rehearing, which was had on May 9, 1955.

The Board, in Footnote 13 appearing on page 18 of its brief, makes certain assertions which also must be answered. The Board says the appellants claimed there was no correspondence between the various respondents in Docket No. 6908 because they were "all out there together and transacted business verbally." The quotation consists of a double hearsay statement contained in an affidavit filed by one Joseph W. Stout, an air transport examiner employed by the Board. Mr. Stout is quoting a statement purportedly made by Mr. Richard H. Keatinge, one of the attorneys for the appellants and the respondents in Docket 6908. The Board has apparently overlooked the fact that Mr. Keatinge, in an affidavit filed in support of appellants' petition for rehearing on April 29, 1955 sets forth his statements to Stout which differ materially from Stout's hearsay statement. While Mr. Keatinge's affidavit was not included in appellants' designation of record on appeal, it is available in the records of the District Court and can be produced at the argument, if this Court should so desire.

The Board's next allegation is that Great Lakes Airlines, Inc. and Currey Air Transport Limited do not have "within their possession or control" any copies of carrier tickets or any coupons of such tickets. While the Board's statement is literally true, the Board has apparently overlooked the fact that it also sought enforcement of another subpoena issued in Docket No. 6908 in Civil Action No. 18122-PH in the United States District Court for the Southern District of California entitled "In the Matter of the Petition of the Civil Aeronautics Board for an

Order, etc." This subpoena is directed to eight of the Skycoach Ticket Agents respondents in Docket No. 6908.[7] For convenience this subpoena is summarized in the appendix to this brief.

The Skycoach subpoena is of importance on this appeal because a stipulation was filed in that cause dated July 19, 1955 and so ordered by Pierson M. Hall, United States District Judge on July 27, 1955, providing that the decision in that cause "shall be governed as to legal principles by the final decision" in this appeal and the District Court is authorized to enter judgment in the Skycoach proceeding in accordance with the legal principles pronounced in this proceeding. This stipulation is set forth in the appendix to this brief. The Skycoach subpoena requires each of the Skycoach respondents to produce all agent and auditor coupons taken from tickets sold to the public during the first three months of 1953 and the last three months of 1954, as well as each of the individual ticket coupons contained in the subpoenas at issue on this appeal [R. 42-43, 50].

The Board states that Great Lakes Airlines, Inc. and Currey Transport Limited have no copies of advertising other than telephone directory advertising. Mrs. Hermann stated in her affidavit that to the best of her knowledge all of the advertising of Great Lakes Airlines, Inc., consisted of telephone directory advertising, other than lists of parts and equipment distributed by the mainte-

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[7]Skycoach Agency of Nevada, Inc.; Skycoach Airlines Agency of Chicago, Inc.; Skycoach Agency of Los Angeles, Inc.; Skycoach Airlines Agency of Milwaukee, Inc., Skycoach Airlines Agency of Detroit, Inc.; Skycoach Agency of San Francisco, Inc.; Skycoach Airlines Agency of New York, Inc., and Super Skycoach Airlines Agency, Inc.

nance division of Great Lakes Airlines, Inc., which the Board representatives stated the Board had no interest in inspecting [R. 133-134].

It is literally true that most of the records of Great Lakes Agency, Inc. were either lost or stolen, as alleged by the Board. However, Mrs. Hermann testified to the disappearance of these records in a previous proceeding before the Civil Aeronautics Board known as Docket No. 5132, the so-called "Non-Scheduled Investigation Case," commencing November 11, 1953 [R. 131-132]. The Board was fully familiar with the fact that these records were either lost or stolen sometime in 1953, and Mrs. Hermann's sworn testimony rendered it unnecessary to include these documents in a subpoena in order to establish this fact on the record in Docket No. 6908.

The Board alleges that the stock certificates of Currey Air Transport Limited are nowhere to be found. While Appellant Robert M. Smith was unable to locate his stock certificate [R. 139], just how this justifies the Board's conclusion that all of the stock certificates of Currey are nowhere to be found, is entirely unexplained. Stock certificates are normally in the possession of the owner of the said certificates, not in the possession of the corporation. The Board does not state, nor could it, that all of the stockholders of Currey Air Transport Limited were called upon to exhibit their stock certificates or were required to do so. In fact, the only stockholder of Currey Air Transport Limited required to produce a stock certificate was Appellant Smith.

There is no basis whatsoever in the record that compliance by the appellants with the District Court's inspection order was accomplished with only the intermittent

assistance of Appellants Robert M. Smith and Ida Mae Hermann. In fact, the record shows that a full and complete inspection was permitted and that Appellants Robert M. Smith and Ida Mae Hermann cooperated fully with the Board's staff [R. 129-142]. The Board stated to the District Court on April 7, 1955 that a period of eleven days would be sufficient time to conduct its inspection. The Board then came forward with affidavits on April 18, 1955 purporting to show that all of the documents included in the subpoenas were not available for inspection, while the Board should have requested additional time to complete the inspection, if, in truth and in fact, it desired a thorough inspection.

Conclusion.

Upon the basis of the foregoing reasons and authorities and the reasons and authorities set forth in appellants' main brief, the order of the District Court should be reversed.

Respectfully submitted,

Keatinge, Arnold & Older,

By Roland E. Ginsburg,

Attorneys for Appellants.

November, 1955.

APPENDIX.

Title 49, U. S. C. A., Section 644. Evidence. . . .

(d) Any court of the United States within the jurisdiction of which an inquiry is carried on may, in case of contumacy or refusal to obey a subpena issued to any person, issue an order requiring such person to appear before the Board (and produce books, papers, or documents if so ordered) and give evidence touching the matter in question; and any failure to obey such order of the court may be punished by such court as a contempt thereof.

Summary of Subpoena at Issue in Civil Action 18122-PH.

The Respondents Skycoach Agency of Nevada, Inc.; Skycoach Airlines Agency of Chicago, Inc.; Skycoach Agency of Los Angeles, Inc.; Skycoach Airlines Agency of Milwaukee, Inc.; Skycoach Airlines Agency of Detroit, Inc.; Skycoach Agency of San Francisco, Inc.; Skycoach Airlines Agency of New York, Inc., and Super Skycoach Airlines Agency, Inc., are required to produce the following records and documents for the years 1952 through January 17, 1955, inclusive:

1. All general ledgers and all subsidiary books and ledgers, and all vouchers, invoices, journals and other supporting documents to the entries in said books and ledgers.

2. All audit reports, financial statements (balance sheet, schedules of cash receipts and disbursements and profit and loss statements).

3. All minutes and notes of directors' meetings and stockholders' meetings, stock record books and all stock certificates.

4. All bank statements and cancelled checks.

5. Specimens of all hand cards, brochures, schedules and other advertising material distributed to the public by the said corporations.

6. All contracts and agreements between any of the foregoing Skycoach ticket agencies and between any of them and the following:

Great Lakes Airlines, Inc.

Currey Air Transport, Limited

Irving E. Hermann and Ida Mae Hermann individually and as co-partners d/b/a Nevada Aero Trades Company,

Air International, Inc.

Great Lakes Airlines Agency, Inc.

7. All individual personnel and payroll records.

8. All correspondence between any of the corporations, partnerships and persons listed below and between any of them and persons or entities acting for or on the behalf of any of them:

Great Lakes Airlines, Inc.

Currey Air Transport, Limited

Irving E. Hermann and Ida Mae Hermann individually and as co-partners d/b/a Nevada Aero Trades Company

Air International, Inc.

Great Lakes Airlines Agency, Inc.

Skycoach Agency of Nevada, Inc.

Skycoach Airlines Agency of New York, Inc.

Skycoach Airlines Agency of Chicago, Inc.

Skycoach Agency of Los Angeles, Inc.

Skycoach Airlines Agency of Newark, Inc.

Super Skycoach Airlines Agency, Inc.

Skycoach Airlines Agency of Boston, Inc.

Skycoach Airlines Agency of Virginia, Inc.

Skycoach Airlines Agency of Milwaukee, Inc.

Skycoach Airlines Agency of Detroit, Inc.

Skycoach Airlines Agency of Washington, Inc.

Skycoach Agency of San Francisco, Inc.

Copies of all income tax returns filed for the calendar or fiscal years 1951 through 1954, inclusive, for the eighth respondent Skycoach ticket agencies and for Gladys M. Sheppard individually.

For the first three months of 1953 and the last three months of 1954, specimens of all tickets and exchange orders sold to the public by the eighth respondent Skycoach ticket agencies, or any of its subagents, and all agent and auditor coupons taken from documents (tickets) actually sold to the public by the said ticket agency corporations during the said first three months of 1953 and the last three months of 1954.

All of the specific flight, auditor and agent ticket coupons required to be produced in the Ida Mae Hermann and Robert H. Smith subpenas [R. 42-43, 50]

United States District Court, Southern District of California, Central Division.

In the Matter of the Petition of the Civil Aeronautics Board for an Order requiring Gladys M. Sheppard and Skycoach Agency of Nevada, Inc.; Skycoach Airlines Agency of Chicago, Inc.; Skycoach Agency of Los Angeles, Inc.; Skycoach Airlines Agency of Milwaukee, Inc.; Skycoach Airlines Agency of Detroit, Inc.; Skycoach Agency of San Francisco, Inc.; Skycoach Airlines Agency of New York, Inc., and Super Skycoach Airlines Agency, Inc., to comply with subpenaes issued by a Hearing Examiner of the Civil Aernoautics Board. Civil No. 18122-PH.

Stipulation Placing Cause Off Calendar Awaiting the Termination of Appeal.

Whereas, the legal issues presented in this proceeding are essentially the same as, and are related to, those presented in a previous proceeding before this Court entitled In the Matter of the Petition of the Civil Aeronautics Board for an Order Requiring Ida Mae Hermann, etc., No. 18031-PH, the subpenas in each case being essentially similar and all the said subpenas having been issued in connection with the same administrative proceeding, and;

Whereas, this Court has heretofore issued an Order Enforcing Subpenas in No. 18031-PH, and an appeal has been taken therefrom, which is pending before the United States Court of Appeals for the Ninth Circuit, and a Stay of Proceedings to Enforce the said Order Pending Appeal having been granted;

It Is Stipulated by and between the parties hereto, through their respective counsel, that this cause may be placed off calendar to be reset at the instance of either

party or by the Court at such time as the appeal in No. 18031-PH has been decided, and;

It Is Further Stipulated that the decision in this case shall be governed as to legal principles by the final decision on appeal in No. 18031-PH; that this Court may enter judgment in this proceeding in accordance with the said legal principles, except that the Court may make such other and further Orders governing the course of this proceeding as it may deem proper in the premises.

Dated this 19th day of July, 1955.

KEATINGE, ARNOLD & OLDER,
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/s/ ANDREW J. WEISZ,
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Attorneys for Petitioner.

It Is So Ordered This 27th day of July, 1955.

/s/ PEIRSON M. HALL,
United States District Judge.